

2016

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<http://hdl.handle.net/10026.1/12517>

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Journal of Intellectual Property, Information Technology and Electronic Commerce Law

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# Regulating Collective Management Organisations by Competition

## An Incomplete Answer to the Licensing Problem?

by Morten Hviid, Simone Schroff and John Street\*

**Abstract:** While the three functions of Collective Management Organisations – to licence use, monitor use, and to collect and distribute the revenue – have traditionally been accepted as a progression towards a natural (national) monopoly, digital exploitation of music may no longer lead to such a fate. The European Commission has challenged the traditional

structures through reforms that increase the degree of competition. This paper asks whether the reforms have had the desired effect and shows, through qualitative research, that at least regarding the streaming of music, competition has not delivered. Part of the reason for this may be that the services required by the now competing CMOs have changed.

**Keywords:** Collective Management Organisations; competition; licensing; reforms; EC; qualitative research

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Recommended citation: Morten Hviid, Simone Schroff, John Street, Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?, 7 (2016) JIPITEC 256 para 1.

## A. Introduction

- 1 The licensing of copyright protected works has been a feature of the music industry for decades, allowing a large variety of users – bars, broadcasters, concert venues etc. – to play music as part of the services they offer. This system rests on central licensing agencies, most commonly known as Collective Management Organisations (CMOs). These administer the rights of copyright holders from a central point, offering licenses to the users. While the system has been in place for a long time and has worked reasonably well (although not perfectly) for analogue uses, the rise of the internet and digital technology has been a game-changer. By expanding the possibility of, and demand for, cross-border uses, the traditional

system has come under considerable strain, and is now reaching breaking point as new types of services such as streaming emerge. These services need to license musical works on an EU or global basis to use the technology's full potential. This is difficult because, until now, the CMOs in the EU have been nationally-based monopolies. To obtain a license that covers Europe, 28 different licenses are, in principle required. Such an arrangement clashes directly with the EU's ambition to create a Digital Single Market (DSM).<sup>1</sup> As a result, the current regulatory regime, particularly as it relates to CMOs, has become a

1 For a discussion of the Digital Single Market, see European Commission, Digital Single Market- Bringing Down Barriers to Unlock Online Opportunities 2015 (available at <http://ec.europa.eu/priorities/digital-single-market/>), last accessed 17/12/15).

prime concern of the EU.

- 2 The functioning of CMOs in the digital domain is of key importance for the DSM.<sup>2</sup> The single market is, after all, intended to allow for the free movement of goods and services across borders, giving EU citizens access to what they most prefer. The inability of the current copyright system to issue cross-border licenses to all users that require them means that CMOs can provide services only on a member state by member state basis, due to the threat of copyright infringement (and therefore high costs) that any unlicensed cross-border use would entail.<sup>3</sup> The result is geo-blocking: individual users are not able to access services once they enter another member state, even if they have paid for those services. Rather than having a single market, online music continues to operate through multiple separate markets.

- 3 The EU's response to this situation has been to issue a Directive,<sup>4</sup> which is due to be implemented in 2016. This Directive formalises competition between CMOs<sup>5</sup>

<sup>2</sup> See, for example, Intellectual Property Office, Collective rights management in the digital single market available 02/01/2015 (at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401225/collective\\_rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401225/collective_rights.pdf)>, last accessed 15/4/16).

<sup>3</sup> There have been agreements in the past that offered MTLs, however, they have either not been renewed (see Santiago Agreement), are limited to specific user groups (Simulcasting Agreement), or have been found to be contrary to competition rules (such as the CISAC Model Agreement). For a detailed description of these agreements, please see: Guibault and Van Gompel, Collective Management in the European Union, in Gervais (ed.), Collective Management of Copyright and Related Rights (Alphen Aan Den Rijn: Wolters Kluwer, 2015, 3<sup>rd</sup> Ed.), 139- 174.

<sup>4</sup> Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive 2014/26/EU) (CMO Directive).

<sup>5</sup> Competition between CMOs for the management of rights of rights has been introduced in the case law before. CMOs have to be seen as dominant undertakings and are therefore subject to competition rules (GVL v. Commission (Case 7/82, [1983] ECR 483, [1983] CMLR 645); RT v. SABAM (Case 127/73, Belgische Radio en Televisie v. SV SABAM and NV Fonior, [1974] ECR 313, [1974] 2 CMLR 238). The results are a number of restrictions on CMOs towards their members. For the purpose of this article, the most important are the following. It was held that CMOs cannot refuse the management of rights by foreigners, even if they are not resident in a country. This is especially the case if the CMO has a dominant position and quasi monopoly (Case 7/82, Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission, [1983] ECR 483; [1983] 3 CMLR 645). In addition, right holders cannot be required to assign all of their rights. (Case 127/73, Belgische Radio en Televisie v. SV SABAM and NV Fonior, [1974] ECR 313, [1974] 2 CMLR 238)), in particular their online rights (Daftpunk) (Case C2/37.219, Banghalter et Homem Christo v. SACEM, 6 August 2002). This is limited by economic viability though. A CMO cannot be forced to accept only those rights which are expensive to administer ( see for example, Case 127/73,

and places obligations upon them to serve better the interests of users<sup>6</sup> and right holders. In this paper, we assess the possible outcome of this initiative, and argue that there might be more effective ways to address the problem posed by creating a DSM. We confine our attention to the music market, which is feeling the effects of the digital revolution most acutely, at least among the creative industries. We also focus our attention to the streaming of music. Similar issues arise regarding the sales of digital music, for example through electronic stores.<sup>7</sup>

## B. Background: The role of the CMO before digitalisation

- 4 As Handke and Towse point out, the licensing market for musical works in an analogue world was (and remains) highly complex.<sup>8</sup> A large number of creators and products (typically, artists and songs) have to be matched with a similarly large number of diverse users. Asymmetry of information in such a situation creates prohibitive transaction costs for individual licensing between a copyright owner and a user. In other words, individual licensing represents a case of market failure in which copyright owners and

Belgische Radio en Televisie v. SV SABAM and NV Fonior, [1974] ECR 313, [1974] 2 CMLR 238, para. 10, 11 and 15).

<sup>6</sup> User interests are only indirectly addressed, for example in the transparency rules which are meant to give users the information they need to choose licenses (see in particular (Directive 2014/26/EU) (CMO Directive), art. 19- 22.).

<sup>7</sup> Some of these issues have been addressed, either through coalitions of old structures to create broader organisations which can offer bundled clearing of copyrights; or through new structures such as Merlin- a right clearance organisation which can also offer MTLs. However, not all Copyright Management Societies in the EU are members of such structures. Thus transaction costs are incurred to provide pan-EU availability of digital music. As Gómez and Martens note: "We find that in August 2013 there was still substantial variation in availability in the iTunes country stores across the EU DSM. Less than half of all song tracks and music albums are available in all EU27 country stores. Overall, music availability in the EU DSM is somewhere between 73 and 82 per cent of what it could be in a fully open DSM where all song tracks and albums would be available in all EU27 countries." (Gómez and Martens, Language, Copyright And Geographic Segmentation in the EU Digital Single Market for Music and Film, JRC/IPTS Digital Economy Working Paper 2015, (available at <<http://ssrn.Com/Abstract=2603144>>, last accessed 15/4/16), 3-4. However, Gómez and Martens do acknowledge that matters are improving. It should also be noted that some right holders' business strategies relies on fragmented markets to maximise profits, as for example in the audio-visual sector. These attitudes may oppose the aims of the Commission but nonetheless also affect the availability of pan- European licenses.

<sup>8</sup> Handke and Towse, Economics of Copyright Collecting Societies, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15).

the users would both lose out. The copyright owner would not generate the income they seek while the user is not able to legally play the music they want. The solution to this problem has involved several intermediaries, including CMOs streamlining the financial transaction between the creator and user.

- 5 CMOs act to reduce the market failure.<sup>9</sup> In general, they have three functions: 1) to license works for specific uses; 2) to monitor the use of works and collect the revenue; and 3) to distribute the revenue to its members.<sup>10</sup> The CMOs collect the revenue for low-value, high volume secondary uses; that is, uses where the individual licensing fee is small but the number of licenses which need to be issued add up to a substantial revenue stream. CMOs manage the rights of its members collectively, providing blanket licenses to users. By managing the rights collectively, they are able to lower the transaction costs as well as provide a stable licensing framework. In economic terms, they enable the market to function by ensuring copyright effectiveness in circumstances where copyright owners cannot contract directly. A blanket license gives users – especially broadcasters – the right to use any music within the CMO’s repertoire. The blanket licenses reduce the transaction costs because they do not require negotiations on the price or the exact size of the rights bundle for each individual transaction.<sup>11</sup>
- 6 CMOs have been a core feature of the licensing market within the EU (and beyond) for more than a century. Based on a system of reciprocal agreements between CMOs, they have been able to license a world-wide repertoire. A user can therefore use any song they want and only pay their local CMO. The transfer of funds across borders is carried out by the CMOs themselves and is of no concern to the user. As a result, CMOs have established a system of national

monopolies, which do not compete with each other, but instead operate under a set of agreements which determine the cost of licenses. While this broad coverage in works, the economies of scale, and the resulting monopoly status contribute to efficient licensing in practice, it is also the source of the European Commission’s main concern. While the licences are “blanket”, their price may well differ according to the type of organisation that requests the blanket licence. No stakeholder is able to judge the price charged and the lack of a viable alternative has meant that a copyright holder has no incentive to defect to a rival CMO, no matter how dissatisfied they are.<sup>12</sup> The CMO’s monopoly status has given rise to typical concerns often attributed to monopolies—namely the potential abuse of a dominant position.<sup>13</sup> Market prices cannot be established; neither for the users in terms of how much they should pay for their license, nor for the copyright owners, in relation to the cost of administration that the system entails.<sup>14</sup>

- 7 EU case law has established that the CMOs are undertakings which hold a dominant position, meaning that they are subject to the full force of competition law, including both article 101 TFEU relating to concerted practices and article 102 TFEU relating to the abuse of a dominant position.<sup>15</sup> This required restrictions on how they operated. However, the CJEU also ruled that CMOs serve the public interest, and that, therefore, competition law was not to be applied rigidly.<sup>16</sup> In other words, while the Court found the monopoly status and reciprocal agreements justifiable in the broader

9 Haunss, *The Changing Role of Collecting Societies on the Internet*, Internet Policy Review 2013, 1-8, Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15).

10 Andersen, Kozul- Wright, Z. and Kozul- Wright, R, *Copyrights, Competition and Development: The Case of the Music Industry*, United Nations Conference on Trade and Development 2000 (available at: <[http://unctad.org/en/docs/dp\\_145.en.pdf](http://unctad.org/en/docs/dp_145.en.pdf)>, last accessed 15/4/16), 21.

11 There is an extensive economics literature on what is often termed “buffet” pricing inspired by the “all-you-can-eat buffets”. Much of this literature has focused on behavioural aspects, in particular those which lead to obesity, which does not appear to be particularly relevant in our context. The behavioural literature is summarised in Lambrecht and Skiera, *Paying Too Much and Being Happy About It: Existence, Causes, and Consequences of Tariff-Choice Biases*, *Journal of Marketing Research* 2006, 212–223 as well as Just and Wansink, *The flat-rate pricing paradox: conflicting effects of “all-you-can-eat” buffet pricing*, *The Review of Economics and Statistics* 2011, 193–200.

12 Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15).

13 Assessing such abuses is made complicated by the two-sided nature of the market, where the intermediary can decide from which side of the market, copyright holders or users, to extract rent, either in terms of funds or a “quiet life”.

14 Kretschmer, *Access and Reward in the Information Society: Regulating the Collective Management of Copyright* (Poole: Centre for Intellectual Property Policy & Management, 2005), 7.

15 Graber, *Collective Rights Management, Competition Policy and Cultural Diversity: EU Law Making at a Crossroads*, I-Call Working Paper 2012 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2161763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161763)>, last accessed 15/4/16), 6.

16 See for example: Case C-395/87 *Ministère Public v Tournier*, [1989] ECR-2521, para. 24; *Lucazeau v SACEM* ECR 2811; *GVL v. Commission* (Case 7/82, [1983] ECR 483, [1983] CMLR 645; Case 127/73, *Belgische Radio en Televisie v. SV SABAM* ECR 51 313. All of these cases involved the application of competition law and recognised that there are legitimate interests that can limit its application in practice. Also discussed in: Graber, *Collective Rights Management, Competition Policy and Cultural Diversity: EU Law Making at a Crossroads*, I-Call Working Paper 2012 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2161763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161763)>, last accessed 15/4/16), 6.

public interest, it also recognised the negative impact the system could have on users and right holders. For this reason, CMOs are required to offer users reasonable licensing terms, while at the same time giving their members as much freedom to administer their rights as independently as possible (as long as this is consistent with the functioning of the CMO as a whole). Copyright owners should be able to administer their rights individually insofar as this does not impose undue costs on the CMO. For example, while withdrawing all one's works or the online rights attached to those works is acceptable, withdrawing the online rights for works A, B and C, but not D, and G, is not, because keeping track would be too expensive for the CMO.<sup>17</sup> In essence, the regulations have attempted to balance the threat of monopolisation against effective rights administration.<sup>18</sup> However, given that there was no viable alternative to the CMO system the Commission tolerated it. The rise of the internet has changed the rules of the game.

- 8 It should be noted that some authors have questioned the treatment accorded to CMOs in the analogue world. Katz in particular challenges the claim that in the analogue world the CMO is a natural monopoly.<sup>19</sup> He observes that more than one CMO may operate in a single territory. Unlike most other countries, where the CMO is a monopolist, the US has three CMOs managing musical works (ASCAP, BMI and SESAC) of which one (SESAC) is rather smaller than the others (less than 5% in 2000)<sup>20</sup> and has coexisted with ASCAP since 1931 and all three have been in the market since 1941. The traditional argument in favour of natural monopoly — economies of scale — is not compatible with the persistent existence of such a small firm.
- 9 Katz reminds us that, while the CMOs charge for a blanket licence, they do not charge all users the same price.<sup>21</sup> Thus they use their monopoly power

to engage in third degree price discrimination<sup>22</sup>, charging different prices to different types of businesses, a practice which has an ambiguous effect on both total and consumer surplus. Katz also points out that the existence of different licences for performance of the work adds an extra tool to the CMO to practice successful price discrimination because it enables the CMO to identify the nature of each user.<sup>23</sup>

- 10 In a supplementary article, Katz explores how his argument would apply in the digital world. Given his conclusion for the analogue world, it is hardly a surprise that he is sceptical about the monopoly argument.<sup>24</sup> However, given when it was written, his paper has to engage in speculation. While it undoubtedly was ahead of its time in 2006, and many of the speculations have come to pass, it adds little to the current debate. However, it does help us understand why the Commission viewed the digital world differently when it comes to competition.

## C. The Digital Challenge

- 11 As digital technology, and especially the internet, rose in importance, the needs of users changed dramatically. A new breed of services came to the fore, most notably, the streaming platforms (Spotify, Deezer, Amazon Music, etc.). They differ from analogue users in the kind of licenses they require. Analogue users only require territorial licenses; their services do not cross national borders<sup>25</sup> and therefore they do not require licenses that extend further. However, the internet (and digitalisation) creates the possibility of easy access to music irrespective of tariff barriers or broadcasting regulations. Any legal service seeking to exploit these possibilities requires multi-territorial licenses. To cater to this need, CMOs reacted first by offering Simulcasting agreements, providing cross-border licenses to internet radio. The Commission accepted this solution as a

17 Kretschmer, Access and Reward in the Information Society: Regulating the Collective Management of Copyright (Poole: Centre for Intellectual Property Policy & Management, 2005), 5.

18 Dietz, Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, *Journal of the Copyright Society of the USA* 2002, 908.

19 Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 541-593.

20 Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 554.

21 Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 541-593.

22 Firms engaging in third degree price discrimination offer different prices to different identifiable groups of buyers – a classic example is different prices for different age groups.

23 Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 550.

24 Katz, The potential demise of another natural monopoly: New technologies and the administration of performing rights. *Journal of Competition Law and Economics* 2006, 245-284.

25 While strictly speaking not true, this is the assumption which has been made in the industry, motivated by a view that Broadcasters are (supposed to) focus on their national audience, not least because of language barriers. The exception is broadcasting with the Simulcasting Agreement which resolves the issue by treating broadcasters as geographically limited users and therefore as essentially the same as analogue users.



permissible exception under article 101(3) TFEU (which began in 2004).<sup>26</sup> However, it remained the exception, even as the Commission came to realise that digital technology was not only changing user requirements but the system as a whole.

- 12 The driver of change was not just user demand, but the very nature of licensing itself. Handke and Towse have argued that primarily, digital technology makes the gathering and processing of information much easier. Secondly, they argue that it enhances market signalling: on one hand, the use of individual works can now be assessed with more precision than before; on the other hand, there is potential for price discrimination and charging every user what they are willing to pay. Finally, as a result of these factors, CMOs are able to reduce their costs.<sup>27</sup> New technologies such as Digital Rights Management (DRM)<sup>28</sup>, which enable rights to be administered individually,<sup>29</sup> can enhance efficiency. This of course undermines the CMO's justification for their monopoly status,<sup>30</sup> as there are now real alternatives to them.

26 Guibault and Van Gompel, *Collective Management in the European Union*, in Gervais (ed.), *Collective Management of Copyright and Related Rights* (Alphen Aan Den Rijn: Wolters Kluwer, 2015, 3<sup>rd</sup> Ed.), 160-161. Other agreements such as the CISAC model contract (leading to the cases European Commission, Commission Decision of 16/07/2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC) (available at <[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf)>, last accessed 17/12/15) and the CJEU decision *CISAC v. European Commission* (Case T-442/08) and the Santiago Agreement (Notification of cooperation agreements (Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM), O.J. C. 145/2 of 17.05.2001) as well as the Barcelona Agreement (Notification of cooperation agreements (Case COMP/C-2/38.377 – BIEM Barcelona Agree-ments), O.J. C. 132/18 of 4.06.2002) were found anti-competitive.

27 Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 13.

28 In this context, DRM is a tool to control the type of access one has to digital music. It controls both access and usage. For a discussion of the merits of DRM, see e.g. Doctorow, *What happens with digital rights management in the real world?*, *Guardian*, 5 February 2014 (available at: <<https://www.theguardian.com/technology/blog/2014/feb/05/digital-rights-management>>, last accessed 15/4/16).

29 Kretschmer, *Access and Reward in the Information Society: Regulating the Collective Management of Copyright* (Poole: Centre for Intellectual Property Policy & Management, 2005), 17.

30 Ficsor, *Collective Management of Copyright and Related Rights*, WIPO 2002 (available at: <[http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo\\_pub\\_855.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf)>, last accessed 15/4/16), 98.

## D. A new regulatory regime

- 13 The change in the Commission's attitude first became clear when it refused to accept the Santiago and Barcelona Agreements, which aimed to extend the analogue licensing system to the digital domain.<sup>31</sup> The Commission's attitude was made even clearer when it rejected CISAC's model contracts. CISAC, the world-wide umbrella organisation for CMOs, devised model contracts to allow its members to offer multi-repertoire, multi-territorial licenses. The contracts had three core features: a national allocation clause, an exclusivity clause, and a non-intervention clause. Combined, the latter two had the effect of maintaining the national delineation of CMOs, guaranteeing their monopolies. While these clauses were not new, the Commission now considered them unjustified— digital technology meant that a local presence was not required to ensure efficient enforcement.<sup>32</sup> The Commission argued that digitalisation enabled CMOs to compete with each other in the field of digital exploitation, meaning online use in practice. Overall, it found the model contract contrary to competition rules under article 101 TFEU,<sup>33</sup> although this decision was overturned by the General Court in 2013.<sup>34</sup> Instead, CMOs should, the Commission believed, compete with each other to attract members and users. This in turn should lead to increased efficiency in the rights administration, aiding the emergence of new markets.<sup>35</sup> The Commission shifted from viewing the CMO as a necessary evil for ensuring the effective licensing of works, to seeing it as an unnecessary anti-competitive undertaking which harmed both right holders and users. This stance was to become clear Commission policy.

- 14 While Katz's analysis casts doubt on the survival of the past monopolising elements of collective rights management, the move to digital exploitation could, at least in theory, give rise to a new monopoly element.<sup>36</sup> This has so far attracted

31 Frabboni, *Collective Management of Copyright and Related Rights: achievements and problems of institutional efforts towards harmonization*, in: Derclaye (ed.), *Research Handbook in the Future of EU Copyright* (Cheltenham: Edward Elgar, 2009), 373-400.

32 Guibault and Van Gompel, *Collective Management in the European Union*, in Gervais (ed.), *Collective Management of Copyright and Related Rights* (Alphen Aan Den Rijn: Wolters Kluwer, 2015, 3<sup>rd</sup> Ed.), 162.

33 European Commission, Commission Decision of 16/07/2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC) (available at <[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf)>, last accessed 17/12/15), 220-223.

34 *CISAC v. European Commission* (Case T-442/08).

35 Sparrow, *Music Distribution and the Internet: A Legal Guide for the Music Business* (Aldershot: Gower, 2006), 1.

36 Katz, *The potential demise of another natural monopoly*:

little commentary. With more data available electronically, a comprehensive database of all right holders and associated material would not only be essential, but also display increasing return to scale both in its creation and maintenance. For full functionality it is important that the database is comprehensive. Given the cost of establishment and maintenance, it would be inefficient to have two parallel fully comprehensive databases. By contrast, the other elements - such as monitoring and collecting money - seem to have less of a claim to monopoly status once services become digital. Given the international nature of such a database, there is a serious issue as to who regulates the terms of access and how the database is to be funded. Building on existing databases held by CMOs, one possibility would be for these to set up an institution to hold, transform and maintain these databases. This has to some extent already happened. Most CMO databases (and all of the ones examined here) are part of CIS-Net, the most comprehensive database for musical works and their corresponding rights. It is owned by FastTrack, which, in turn, is owned by the CMOs. The question is whether competition among the CMOs (in the EU) is sufficient to generate a comprehensive database, whilst at the same time engendering a meaningful and valuable choice.

agreements and full harmonisation.<sup>39</sup> Their approach became law in the 2014 CMO Directive 2014/26/EU. The Directive focused on more competition rather than on harmonisation or an extension of the traditional system of reciprocal agreements. The Directive aims at providing an environment in which competition can be fully effective. It sets minimum standards for the transparency and supervision of CMOs by their members and therefore the right holders.<sup>40</sup> Both of these are typical competition remedies, which have been applied to areas such as the energy market. In the case of the music industry, EU policy is based on the distinction between the analogue and the digital licensing market for musical works, and the need to alter the role played by CMOs in the latter. However, the major CMOs are already meeting the Directive's demands,<sup>41</sup> so the question is whether the legislative intervention will have its intended effect. After all, if the database existed and access was regulated/mandated, then the right holder would genuinely have choice based on the quality of service.<sup>42</sup> To answer our question, we investigated the problems that actually affect users in the digital realm.

## E. Methodology

- 15 In 2005, the Commission reported on the lack of cross-border licenses for users in the online market. It proposed that rights holders should be free to choose their CMO, the rights that they assign to it and their associated territorial reach.<sup>37</sup> The underlying rationale is a typical competition remedy: by giving the individual the choice over the provider, they can choose the service that most closely matches their preferences. In other words, by allowing right holders to vote with their feet, CMOs would be bound to become more efficient in an effort to not lose members. Furthermore, CMOs would issue pan-European licenses, and by choosing their CMO carefully, rights holders would be able to ensure that each CMO would be able to offer coherent bundles.<sup>38</sup> The Commission's recommendation rejected the analogue services' use of reciprocal licence

- 16 To understand the current state of licensing in the EU, we compared the experience of an analogue user with that of one who seeks a license for online exploitation. We simulated the path a potential broadcaster or web-streaming service would follow in acquiring a license, starting with the first search to identify CMOs all the way to the final license. It is assumed that the broadcaster seeks a multi-repertoire, single-territory license because they want to be able to use all kinds of music in their programming which, by the nature of the broadcasting sector, is assumed to reach a national audience. By contrast, a web-streaming service would also want to offer all kinds of music but on a multi-territorial basis, making its programmes accessible around the world, or at least within Europe to fully exploit the potential of the Single European Market.

Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 541-593, Katz, The potential demise of another natural monopoly: New technologies and the administration of performing rights. *Journal of Competition Law and Economics* 2006, 245-284.

37 European Commission, Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC)" (available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005H0737&from=EN>>, last accessed 17/12/15).

38 Note that rights holders would have an incentive to seek out CMOs who "managed" material similar to their own to give that CMO more bargaining power vis-à-vis the users.

39 Kretschmer, Access and Reward in the Information Society: Regulating the Collective Management of Copyright (Poole: Centre for Intellectual Property Policy & Management, 2005), 13-14.

40 Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive 2014/26/EU) (CMO Directive), Part III.

41 Schroff and Street, The politics of the digital single market: the case of copyright, competition and collective management organisations (forthcoming).

42 For music, there may be an unnecessary stumbling block as rights can only be assigned on an exclusive basis to a CMO and therefore not to more than one collecting agent at the same time.

We used these two licensing scenarios to explore the practical issues raised by providing multi-repertoire, cross-national content.

- 17 The empirical research was designed in such a way as to give a realistic picture of the situation and challenges faced by practitioners. For this reason, it was carried out by a research associate who has legal training but is not working in the field of intellectual property or licensing copyright material. In our view, this mimics the experience of those individuals who have to acquire licenses for commercial services. The researcher was asked to keep track of how she identified relevant organisations, noting down the challenges that she encountered. We chose a representative set of European case studies: the UK, France, Germany and Sweden. The findings are striking: while the analogue user finds a system in place to satisfy their licensing needs, the same is not true for those who want to run streaming services.

## F. Findings: the problems for online users

- 18 The main finding is that CMOs are either unable or unwilling to satisfy the demand of online-services. When a broadcaster seeks a license, all of our case studies were able to provide them with a multi-repertoire license for the rights in musical works. This was because of the reciprocal agreements that CMOs have with each other. In this sense, the broadcaster has in this sense access to a one-stop-shop. Table 1 below summarises the steps taken as well as the key difficulties in obtaining the right to make copyrighted content available across borders in the case of broadcasting. It is clear from Table 1 that there are only limited difficulties in obtaining a licence for traditional broadcasting.

19 Table 1: Broadcasting

	France	Germany	Sweden	UK
<b>Licenses Required</b>	SACEM (covers other CMOs for musical works) SCPP/ SPFF	GEMA GVL	STIM SAMI IFPI	PRS/ MCPS PPL
<b>Information on Coverage</b>	Yes	Yes	Limited	Yes
<b>Broadcasting Tariff available online</b>	Yes	Yes	No	Yes

<b>Indemnity for Licensees (coverage of non-members)</b>	No	Limited (presumption of management)	No	Limited (presumption of management in some cases)
<b>Information available in English</b>	Partial (does not include substantive licensing information)	Partial (does not include substantive licensing information)	Yes	Yes

- 20 In contrast, Table 2 below demonstrates the considerably greater difficulties encountered in obtaining licences for web-streaming. The licenses for online uses are a lot more complicated, not least because the descriptions used by the CMOs are very vague. Although some multi-territorial licenses exist, it is not clear which works are covered by them. For example, in the UK it is apparent that PRS, the CMO for songwriters, composers and publishers, is able to license the Anglo-American repertoire of certain publishers on a multi-national basis. However, there is no way to check what is actually included in this description. They are not blanket licenses like the ones available to broadcasters in the analogue system. This means in practice that more than one license is necessary to cover the same category of works, increasing the cost for the user.

- 21 Secondly, just because the license is described as multi-territorial, it does not follow that this involves EU-wide coverage.<sup>43</sup> For example, the French CMO SACEM is only able to license France, Luxembourg and Monaco – the three countries in which it is the main CMO anyway. It would have always been able to license these even without a change in EU policy.<sup>44</sup> Similarly, the other CMOs only offer licenses that cover a very limited number of countries, but none of them provided clear information as to what countries were included. As a result, not only is there no comparable one-stop shop, the territorial gaps in the license are also unclear, giving rise to major concerns regarding what is allowed. In sum, while a broadcaster is provided with a one-stop-

43 A similar problem was observed for the sale of digital music, see Gómez and Martens, Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film, JRC/IPTS Digital Economy Working Paper 2015, (available at <<http://ssrn.Com/Abstract=2603144>>, last accessed 15/4/16).

44 The CMO Directive has been an issue at EU level for a significant amount of time before the Directive was finalised. It is therefore possible that stakeholders anticipate the changes early on knowing that they will have to comply at some point. Having said this, SACEM has been able to issue licenses for these three territories for years. It is therefore unlikely that changes in EU policy had an effect on SACEM in this case.



shop to satisfy their licensing needs, the same route is not available to online services wishing to operate across borders. In fact, they struggle with a more fundamental problem — a lack of information about the coverage of the license.

**22 Table 2: Web-streaming**

	France	Germany	Sweden	UK
<b>Relevant CMOs</b>	SACEM but does not cover phonograms or performances	GEMA but does not cover phonograms or performances	STIM but does not cover phonograms or performances	PRS but does not cover phonograms or performances
<b>MTL Licenses</b>	Not available. SACEM offers a license limited to specific territories but not truly MTL. No information available from other CMOs	Not available. GEMA offers an online tariff covering Germany and some limited multi-national licenses but not Europe-wide. No online tariff by GVL	Not available. STIM offers some limited MTL, especially for Scandinavia. No information available from other CMOs	Not available. PRS/ MCPS offers a license limited to specific territories but not truly MTL. No information available for PPL
<b>Tariff available online</b>	Only SACEM for limited territories	Only GEMA for limited territories	Only for STIM for limited territories	Only for PRS/ MCPS for limited territories
<b>Indemnity for Licensees (extent to which non-members are covered)</b>	No	Limited (presumption of management)	No	Limited (presumption of management in some cases)
<b>Information available in English</b>	Partial (does not include substantive licensing information)	Partial (does not include substantive licensing information)	Yes	Yes

23 A second notable insight from the two tables is the similarities across the countries and hence the relevant CMOs. If competition was driving new or better licensing services, one would expect to see more variation.

## G. The Directive and the limitations of competition

24 It would appear from our research that the Directive not only offers no solution, but in fact worsens the problem in some areas. The reasons can be found in its inadequate conceptualisation of copyright, especially its dynamics and the interests involved. In fact, in its current form, it is likely to make the situation more difficult for the majority of authors and users, only really benefitting a small group of large right holders.

## I. The User Lost in the Labyrinth

25 The real losers of the changes are the users in the online environment. Having blanket licenses, as broadcasters do, means that most of the identification costs associated with licensing is carried by the CMO. They have to identify the relevant right holders, and they have to transfer revenues to sister CMOs for the repertoire that is used. In the digital environment, the cost is shifted entirely onto the user. Online users however, have to identify the relevant right holders because CMOs are not able to offer blanket licenses. Instead, the user needs to contact a large number of CMOs, hubs aggregating the repertoire of different CMOs, and even individual right holders.

26 Where the local CMO cannot provide licenses with multi-territorial cover, the user has to contact the CMOs in all member states as well as those right holders that have withdrawn their rights.<sup>45</sup> This poses major problems for all aspects of the licensing process. First, there is the problem of identifying the repertoire which requires an additional license and the right holders associated with it.<sup>46</sup> As we have seen, statements about the scope of the repertoire and rights managed by the CMO can be very vague, rendering it difficult to tell what is and is not included. Databases, such as CIS-Net, are

<sup>45</sup> An alternative would be to “boycott” songs which were not obviously covered by readily available licences. This may lead to either pressure from the rights holders of those songs to have them included or to migration of those rights holders to another CMO.

<sup>46</sup> How big the problem is depends on the activism of the rights holders. If they are very active users of the services, they will identify which CMO offers the best home in terms of repertoire and shift their licences to that CMO. More generally it is important not to treat the rights holders as passive actors.

not publicly accessible.<sup>47</sup> As a result, the only way<sup>48</sup> a user could guarantee a multi-repertoire, multi-territorial blanket style license would be to contact all CMOs or the necessary combination of hubs and CMOs. This difficulty is exacerbated by the absence of authoritative and complete lists to identify CMOs, especially across borders. Our research revealed (especially the second row of Table 2) that it is difficult to identify all relevant CMOs without resorting to the academic literature — a resource which is not easily accessible to the general public. In fact, determining which CMOs need to be contacted has proved to be yet more complex because the information provided is vague. A potential user has to read around the topic, relying on blogs and similar searches. While this may work in practice, the lack of verifiable information is a source of concern. Furthermore, while CMOs provide significant amounts of information on their homepages, it tends to be in their national language. In cases where sections have been translated into English, they are often significantly smaller. In particular, translations of licensing forms are not available. By comparison (Table 1), broadcasting tariffs are clearly accessible and explained by all the relevant organisations on their websites.

- 27 Given the complexity of the task, users can never be sure if they have actually covered everything and potentially expensive infringement claims remain a possibility. Given the problem of securing the necessary complete clearance, one might reasonably wonder whether it would be better not just for the user, but possibly also overall, if it was accepted that there might be occasional copyright violations but that these would be resolved through court settlements.<sup>49</sup> The key issues here are: what the costs and fines are in cases of infringement; whether the fine is proportional to the loss suffered by a rights holder; and whether the latter ought to have a duty to make it clear which CMO or other vehicle is used for revenue gathering. The extent of the damages depends too on the type of business requiring the licence. In the case of YouTube-style ones, they will be told to take something down. If they do not comply reasonably fast, then they will be held liable. If the service is a Spotify-style one

(i.e. no user uploads), then the service would be liable straight away as licenses have to be sought before the service is made available. One question is whether the strategic re-assigning of rights can be used to deceive or trick users in order to cash in later, essentially by acting in a manner equivalent to patent trolls.

- 28 There is very little information available on how much licensees have to pay as a result of licensing disputes. Most disputes are settled out of court and the details are kept confidential, even if they involve a large number of plaintiffs complaining against a licensing fee.<sup>50</sup> One of the few exceptions is the example of NSM Music which was ordered to pay £85,000 plus interest and legal costs after it lost a licensing dispute with PRS for Music.<sup>51</sup> However, the claims involved in these cases are substantial. In the long-running dispute between the German GEMA and YouTube, the demands reached €1.6 million for the infringement of 1,000 songs that were uploaded by users without consent.<sup>52</sup> In fact, it demanded 0.37 euro cent for each time a song is played.<sup>53</sup> It is easy to see how this could lead to very high costs once the provider is found liable.<sup>54</sup>

## II. Everyone Loses Out: the Income

- 29 The complexity of the current system is also likely to lead to an overall lower licensing income, simply because users cannot manoeuvre the system efficiently. As a result, they either do not offer a service on the scale they would prefer, or they do not pay all rights holders as they should.
- 30 Looking at the system in practice clarifies this. Today, those CMOs that are able to offer truly multi-territorial licenses are managing Hubs. Hubs refer to the separate legal entities founded by a (large-

47 An interesting question is whether an exclusion could be challenged on competition grounds as an abuse of dominance. The databases may be seen as essential facilities to which some users might be able to force access in return for a reasonable fee.

48 Given the current set-up. As Katz points out, there are alternative solutions if the rights holders and publishers are ready to embrace them. Inspiration for this could potentially be drawn from the e-book market. (Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 541-593.)

49 See *Viacom International, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103.

50 *ITV et al v PRS and MCPS*, Consent Order by the Copyright Tribunal (cases CT 117,188, 199) (available at <<http://www.bailii.org/uk/cases/UKIntelP/2012/o011911.pdf>>, last accessed 15/4/16).

51 PRS for Music, NSM Music ordered to pay PRS for Music license fees 2011 (<<http://www.prsformusic.com/aboutus/press/latestpressreleases/pages/nsmmusicorderedtopayprsformusiclicencefees.aspx>>, last accessed 15/4/16).

52 LG München I: Keine Haftung des Plattformbetreibers für Urheberrechtsverletzungen, MMR 2015, 831. The revision was also turned down: OLG München: YouTube schuldet GEMA keinen Schadenersatz, MMR-Aktuell 2016, 375539.

53 Schadensersatzprozess: Gericht weist erneut Gema-Klage gegen YouTube ab, *Der Spiegel* 28 Jan 2016 (<<http://www.spiegel.de/netzwelt/netzpolitik/youtube-gema-verliert-vor-olg-muenchen-a-1074418.html>>, last accessed 15/4/16).

54 It should also be noted that YouTube was not found liable in this case due to secondary liability issues. The fee demand itself was not determined as unreasonable.

scale) right holder for the purpose of licensing. Most of them cooperate very closely or are even managed by one or more CMOs. As a result, these CMOs are able to license this repertoire in addition to their own repertoire. However, the CMO which had originally held these works will not be able to issue a license anymore.<sup>55</sup> Major publishers have bundled their rights in these Hubs but the repertoire is not universal. Instead, repertoire coverage is divided by publisher or even by sections of a publisher's repertoire (for example, Latin-American or Anglo-American music). The management of Hubs overlaps so that specific CMOs are able to license rights of more than one repertoire. For example, PRS for Music in the UK is involved in "*Peer Music Publishing Anglo-American repertoire, Imagem Anglo-American repertoire, IMPEL Anglo-American repertoire, CELAS and SOLAR*<sup>56</sup> (EMI and Sony/ATV Anglo-American repertoire) and Warner Chappell Music Publishing repertoire as a PEDL partner".<sup>57</sup> However, depending on what type of repertoire the user requires, it is likely that they will have to contact more than one CMO to cover all the required rights. The multi-repertoire license has been sacrificed for multi-territorial coverage as the licenses do not combine both.

- 31 In addition, these Hubs cover only musical works. All other types of works for which licenses are required cannot be cleared this way. Record labels which own the rights in the performance and phonogram usually manage their rights individually, but on a multi-territorial basis. The exception is Merlin which licenses for a range of Independent labels on a multi-territorial basis.<sup>58</sup> There is also some limited

cooperation for cross-border licensing among the CMOs in this area. For example, GVL, the German CMO for performances and phonograms, offers multi-territory licenses, but these cover only 20 member states<sup>59</sup> and is therefore not sufficient for EU-wide clearance, which for example Europeana<sup>60</sup> requires. Europeana only accepts works which will be accessible in all EU member states.<sup>61</sup> As a result, it would be necessary in most cases to contact the record label in order to clear the rights in the records and performances; contacting the CMOs alone would not be sufficient as they cannot provide adequate MTL coverage. Finally, there is still no authoritative list of Hubs and CMOs and of which works and rights are covered, making the process more laborious.<sup>62</sup> As a result, the MTL licensing of musical works is entirely divorced from other related rights, even when they are intrinsically linked - such as musical works and performances.

- 32 In practice, finding Hubs takes a significant amount of effort in practice. They are not prominently featured or promoted by the CMOs. There is also no database or similar facility to help users determine if there is a Hub able to provide them with the license they seek. Furthermore, even these projects are very limited in scope. In fact, most focus is on the Anglo-American repertoire. These Hubs also do not have separate homepages with licensing facilities that can be contacted directly; they are managed by the CMOs. Thus, the number of potential actors has increased, rather than decreased - another step away from the one-stop-shop that broadcasters enjoy.<sup>63</sup> If musical works cannot be licensed, incomes cannot be generated and therefore the incentivising effect of copyright is itself weakened.

55 Exploitation contracts that CMOs have with the right holder do usually require the exclusive assignment of rights. The Directive does not actually prohibit that. As a result, when the rights are withdrawn, they are usually withdrawn entirely, meaning that the original CMO does not manage them anymore. The right holder is still able to license non-commercial uses directly (article 5(3)) but these are not relevant for this study. It should be noted though that if the MTLs are based on the passport system, meaning that CMO 1 has mandated CMO 2 to manage the online licensing under article 29 of the CMO Directive, then these agreements are not exclusive. However, this is not the case for the HUBs discussed here as these have the rights entrusted to them directly.

56 SOLAR combines the Hubs from PAECOL (GEMA) and CELAS. GEMA, Sony/ATV Launches Joint Venture with PRS for Music and GEMA (<[https://www.gema.de/en/aktuelles/sonyatv\\_launches\\_joint\\_venture\\_with\\_prs\\_for\\_music\\_and\\_gema-1/](https://www.gema.de/en/aktuelles/sonyatv_launches_joint_venture_with_prs_for_music_and_gema-1/)>, last accessed 14/9/15).

57 PRS for Music. 2015. "Multi-Territorial Licensing" (<<https://www.prsformusic.com/users/broadcastandonline/onlinemobile/multiterritorylicensing/Pages/default.aspx>>, last accessed 10/9/15).

58 Merlin is a rights clearance organisation that manages the rights on behalf of independent labels. In difference to other organisations in this area, its licenses cover more than one territory. In other words, the user can license the rights held by many different independent labels in a one-stop-shop by contacting Merlin. They do not have to go back to the

labels. It is an issue though that the actual membership is not known and therefore may not represent a specific Indie label in question. (<<http://www.merlinnetwork.org/>>, last accessed 10/9/15).

59 GVL, Länderliste Web\_radio (available at <<https://www.gvl.de/rechtenutzer/webradio/laenderliste-webradio>>, last accessed 10/9/15).

60 Europeana is the common gateway where users can access materials digitised and hosted by European cultural heritage institutions. It can be accessed here: <<http://www.europeana.eu/portal/>>. The example is used here because it has been actively promoted at EU level.

61 GVL, Länderliste Webradio (available at <<https://www.gvl.de/rechtenutzer/webradio/laenderliste-webradio>>, last accessed 10/9/15).

62 The CMO Directive does envisage such a list and requires the Commission to make it public. However, this has not happened yet. (Directive 2014/26/EU) (CMO Directive), art. 39.

63 This highlights the fundamental trade-off between the greater convenience of dealing with a single firm, a monopoly, and that with a monopoly where there is no competition. A similar dilemma has in the past arisen in the case of "yellow pages", where both advertisers and consumers would prefer a single provider so long as that provider did not abuse its monopoly position.

- 33 This is made even worse in practice as the Directive omits a key part of the licensing process. Licensing music is a direct result of copyright law, especially the right to control the public performances of musical works and sound recordings. The Directive only sets licensing standards for the multi-territorial licensing of musical works. However, from a copyright point of view, performing a work in public, such as streaming or broadcasting it, requires a license covering the performance and the recording of the work. These are considered neighbouring rights and administered by a distinct and separate set of CMOs.
- 34 The clearest indication of this is the lack of streaming tariffs via CMOs for neighbouring rights. For example, in Germany a broadcaster needs a license from GEMA for the musical work and from GVL for the performance and the sound recording. For streaming the situation is more complicated and more fragmented. The GVL, for example, does not offer a streaming tariff on its homepage and in fact also does not mention how to acquire the license in practice. This means that a user has to contact the right holder directly - a very onerous process in practice, given the large number of record labels and other right holders involved. The situation is not any different in the other member states; in all our cases the access to neighbouring rights for online exploitation is limited in comparison to analogue uses (such as broadcasting). In this respect, it is unrealistic to expect users to acquire the correct license in a system that is vague, highly complex and unable to meet the demand. The failure of licensing practices to change quickly enough could actually harm the aim of copyright as a whole.

### III. The Freedom of the Right Holder

- 35 For the user, the fragmentation of the rights is the root of the problem. However, the Directive explicitly allows copyright holders to split their rights into bundles, based on the type of right and the territorial scope. This results in a worsening of the situation: the administration of rights has become increasingly fragmented.<sup>64</sup> In particular publishers and record labels can now administer their rights themselves, having withdrawn them from the CMO system.<sup>65</sup> However, they have not withdrawn

the works as a whole, but instead only the online rights. In other words, while the CMO may be able to license the work for broadcasting, it cannot do so for online exploitation. This fragmentation places a substantial burden on CMOs and right holders to keep track of who holds what right to which work. This task should not be underestimated.<sup>66</sup> Some CMOs themselves struggle to identify the specific works and rights that they administer.<sup>67</sup>

- 36 Secondly, by allowing not only CMOs but also independent rights management organisations (which focus on licensing without the collective component)<sup>68</sup> to administer rights, the Directive has effectively endorsed the licensing Hubs. Given the demand for multi-territorial licenses, CMOs have had to cooperate with each other and with major publishers to offer multi-territorial licenses. While these Hubs are managed by the CMOs, they are distinct from them. This means that rather than competing with each other to offer multi-territorial licenses, CMOs are being hired by right holders to do this via a clearing house system. It also means that the usual social and collective features of the CMO, a key element in the justification of their existence is being marginalised.
- 37 In sum, the remedy which was supposed to bring about CMOs to provide multi-territorial licenses has instead cemented a fragmented system where it is not clear what a license covers. Right holders have got the power to choose where to register their rights. Their decision will be determined both by the nature and offerings of those who are willing to have the rights registered to them and the users of the services of those organisations, such as the streaming services themselves and their consumers. While it is unhelpful to look at this market through the lens of the theory of two-sided markets, it is important to keep in mind that to achieve the best

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in musical works for online use in the internal market (Directive 2014/26/EU) (CMO Directive), Part III.

64 Cooke, *Dissecting the Digital Dollar, Part One: How streaming services are licensed and the challenges artists now face* (London: Music Managers Forum., 2015)

65 Arezzo, *Competition and Intellectual Property Protection in The Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights And Shadows of The New European Directive 2014/26/EU*, *International Review Of Intellectual Property And Competition Law* 2015, 545, Directive on collective management of copyright and related rights and multi-territorial licensing of rights

66 In this respect some may argue that the CMOs are simply left with the wrong “technology”, i.e. databases, which may make the intervention by the Commission look harsh. An unresolved question is whether the CMOs have been less innovative than on other sectors because they were part of a set of cosy monopolists or because there are some issues which make it fundamentally harder to bring music into the 21<sup>st</sup> century.

67 Ranaivoson, Iglesias, and Vondracek, *The Costs of Licensing for Online Music Services: An Exploratory Analysis for European States*, *Michigan State International Law Review* 2013, 674.

68 CMOs license works and use some of their income for services to the membership as whole, including social insurances, pensions and cross-subsidising of genres. Rights management organisations license works and distribute the income to the right holders, without providing broader services like CMOs do. As a result, the cross-subsidising from successful to less successful right holders is significantly more limited.



financial outcome for the rights holders, creating appropriate bundles of music is clearly valuable.<sup>69</sup> In other words, there is a natural tendency to have CMOs that cover all works and represent all rights.

## IV. Who Benefits?

38 In addition to the problems of rights fragmentation, there are questions concerning the benefit to be derived for the majority of authors. The clear winners of the changes are successful artists and large right holders, such as publishers and labels. They have the resources to administer their rights on their own.<sup>70</sup> This trend has been most recently confirmed by Arezzo who sees the publishers as exploiting the new options.<sup>71</sup> Withdrawal of rights in order to ensure efficient administration is not a realistic option for most right holders, a problem that is compounded by the fact that CMOs are not required to use a common language.

39 In addition to the practical and technical issues not addressed by the Directive, the Commission has

69 Arezzo, Competition and Intellectual Property Protection in The Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights And Shadows of The New European Directive 2014/26/EU, *International Review Of Intellectual Property And Competition Law* 2015, 534-564.

70 Ficsor, Collective Management of Copyright and Related Rights, WIPO 2002 (available at: <[http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo\\_pub\\_855.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf)>, last accessed 15/4/16), 97; Handke and Towse, Economics of Copyright Collecting Societies, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 10. They also have more lobbying power and it is important to be alert to the dangers that such lobbying power leads inappropriate regulation and potentially slower convergence.

71 Arezzo, Competition and Intellectual Property Protection in The Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights And Shadows of The New European Directive 2014/26/EU, *International Review Of Intellectual Property And Competition Law* 2015, 534-564. For early predictions of this phenomenon, see Kretschmer et al, *The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates*, Prometheus, 1999, 163- 186; the issue raised during the public consultation: Max Planck Institute for Intellectual Property and Competition Law, Comments on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2208971&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971&download=yes)>, last accessed 13/10/16), especially para. 17; and evidence that this is already happening: 1709 Blog, Is Universal Publishing's exit from collective licensing a step backwards for music industry 'one stop' aspirations? (available at: <<http://the1709blog.blogspot.nl/2013/02/is-universal-publishings-exit-from.html>>, last accessed 13/1/16).

a highly simplistic view of author preferences. It does not allow for how interests within the right holder group may differ. Larger right holders have an interest in leaving because, for them, economic performance is key.<sup>72</sup> Successful artists and commercial copyright holders have an interest in generating revenue compared to a less successful artist who may rely on a wider distribution of their works in order to generate a fan base.<sup>73</sup> In terms of rights administration, this translates into the larger owners preferring efficiency above other services that CMOs provide (for example, social insurance).

40 Following the Commission's logic, relying on increased competition protected through competition law can make CMOs focus both on generating faster, more accurate practices, as well as lowering overheads. However, there is no accepted measure for CMO performance<sup>74</sup> and therefore neither for "efficiency". The one figure indicating the cost of rights administration for the copyright owner is the administration rate. It measures the percentage of royalties that are used for administration and indicates its relative cost. This is the only directly comparable figure which the CMO Directive requires to be published.<sup>75</sup> Therefore, for copyright holders focusing on economic value a lower administration rate is more attractive.

41 However, the reliance on administration rates has two major drawbacks. First, in a world where there is a choice between CMOs, this would seem an inadequate measure of performance. Having a measure which focuses solely on the cost side is rather limited, since an artist is interested in the absolute amount of money they receive. To be satisfied with the current measure would mean

72 This is a well-known problem for cooperatives – and at least for some aspects of the business model, one can equate a CMO with a marketing cooperative. When cooperatives have members with very diverse interests and aims, the cooperative tends to malfunction and the more powerful members tend to leave as they can do better on their own. See e.g. Henriksen, Ingrid, Morten Hviid and Paul Sharp, 2012, Law and peace: Contracts and the success of the Danish dairy cooperatives. *The Journal of Economic History* 72, 197-224.

73 Kretschmer, Digital Copyright: the End of an Era. *European Intellectual property Review* 2003, 333-341.

74 Handke and Towse, Economics of Copyright Collecting Societies, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 6.

75 Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive 2014/26/EU) (CMO Directive), art 22 and Annex. All of the other indicators which need to be published are in absolute numbers, making them not directly comparable across CMOs. For example, the collected revenue strongly depends on the membership size, making the absolute value in Euros a relative figure.

always preferring a CMO which had low costs, but which generated very little revenue, to one with high costs but also high revenue.

- 42 Secondly, if CMOs choose to compete, as the Commission intends, it would be on the basis of the administration rate as an indicator of economic efficiency. This would attract the right holders with the most valuable repertoire. The administration fee is currently the same, irrespective of the actual cost of collection. However, as more successful works are easier to administer in practice, larger right holders are cross-subsiding less successful ones.<sup>76</sup> They therefore have an incentive to leave and as a result, the cross-subsidy is likely to unravel.<sup>77</sup> CMOs seeking to prevent this are more prone to the influence of these larger right holders. As their threat to exit is also the most credible, it will enhance their influence within CMOs.<sup>78</sup> As CMOs have in practice significant leeway in determining both the tariffs as well as the distribution policies,<sup>79</sup> smaller right holders are more likely to be losing out.
- 43 A possible casualty of a more economic/competition approach in this market is the demise of the social and cultural features of the old CMOs. These required a cross subsidy between artists. With the focus on the economic value of the organisation, the incentive to provide these subsidies will decrease. CMOs with a stronger social component would be left with repertoire of a lower market value, raising the costs per work even more.<sup>80</sup> At the same time, it is hard to see the justification for these services being bundled with the other activities of a CMO and being protected through competition law. Channelling the funds from online exploitation and bypassing the established CMO system is likely to work in the same way.
- 44 This situation feeds back into one of the main issues raised by the effect of copyright. Copyright protection, and especially its strengthening, is usually linked to the harm it does to creators, rather

than to the larger corporations which do not create works, but exploit them. This concern derives from the assumption of “the romantic author”: the lone creator who works independently.<sup>81</sup> This paradigm is further reinforced by the language used to describe unauthorised use, most notably the moral condemnation of piracy.<sup>82</sup> A similar argument has been made in relation to the term “extension for performers”. Famous artists, such as Sir Cliff Richard, have actively lobbied on this basis.<sup>83</sup> However, as the licensing regime moves away from income from shared performance rights as CMOs guarantee,<sup>84</sup> the benefits to the creator are further undermined. The fear is that the regime is increasingly serving the interests of the large stakeholders, whether corporate or individual.<sup>85</sup>

## H. Conclusion

- 45 Our empirical investigation clearly shows that the current system in place for online music licenses is falling significantly short of the Commission’s aims.<sup>86</sup> First, it is nearly impossible to determine who can offer an online license, and which works and territories it covers. The information asymmetry faced by users has been made even more problematic by Hubs with limited coverage because it increases the number of relevant players. (This issue has been

76 Wallis, Kretschmer and Klimis, *Contested Collective Administration of Intellectual Property Rights in Music- The Challenge to the Principles of Reciprocity and Solidarity*, *European Journal of Communication* 1999, 14-15.

77 Competition typically leads to an unravelling of cross subsidies.

78 Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 10.

79 Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 6.

80 Handke and Towse, *Economics of Copyright Collecting Societies*, SSRN 2007 (available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159085](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085)>, last accessed 14/12/15), 10.

81 For a more detailed description, see Rose, *Authors and Owners* (London: Harvard University Publishing, 1993) and Campbell, *Authorship, incentives for Creation and Copyright in the 21<sup>st</sup> Century*, *Proceedings of the American Society for Information Science and Technology* 2006.

82 Ricketson and Ginsburg, *International Copyright and Neighbouring Rights- The Berne Convention and Beyond* (Oxford: Oxford University Press, 2006), 21.

83 Atkinson, *Sir Cliff Richard’s victory: an extra 20 years of copyright protection for sound recordings is only weeks away* (available at: <<http://www.technology-law-blog.co.uk/2013/08/sir-cliff-richards-victory-an-extra-20-years-of-copyright-protection-for-sound-recordings-is-only-we.html>>, last accessed 17/12/15). Cliff Richard does not write songs, he only performs them. This makes him a performer but not an author under copyright law. However, it shows how the notion of creativity has expanded over time.

84 Most commonly, the income is divided 1:1:1 between the composer, lyricist and publisher, with payments directly to the right holder.

85 For a detailed empirical analysis of copyright reforms from this angle, see Schroff, *The evolution of copyright policies (1880-2010): a comparison between Germany, the UK, the US and the international level*. Doctoral thesis at the University of East Anglia 2014 (available at <<https://ueaeprints.uea.ac.uk/49708/>>, last accessed 15/4/16).

86 The same is true for the sales of digital music, see Gómez and Martens, *Language, Copyright And Geographic Segmentation in the EU Digital Single Market for Music and Film*, JRC/IPTS Digital Economy Working Paper 2015, (available at <<http://ssrn.Com/Abstract=2603144>>, last accessed 15/4/16).

known for at least a decade, yet no obvious solution has emerged). Secondly, the price of licenses is also unknown. While a system of tariffs is supposed to reduce the transaction costs by addressing the information asymmetry, this is not the case for online licenses. Standard online licenses are not pan-European. At the same time, there is virtually no information available on the cost of pan-European licenses as granted by Hubs. Thirdly, rather than competing with other CMOs, they are hiring out their administrative capabilities to large scale right holders, in particular publishers. All of the major Hubs are associated and run out of the offices of a major CMO, in particular PRS, GEMA, SACEM and SGAE. Their changes are not aimed at the individual creator but instead large intermediaries. As these Hubs are separated from the CMOs, the revenue they generate is separate too, and may therefore not contribute to the social/cultural aspects of the CMOs' work. In other words, CMOs are helping large right holders to channel income past the established system. As the major CMOs are already complying with the CMO Directive's provisions on multi-territorial licensing, we are left to ask: what is wrong with the EU's attempt to meet the demands of digitalisation?

- 46 The current insistence on rights being entrusted by the right holder to a single CMO exacerbates the problems. Right holders are unable to create competition through multi-homing. As Katz argues, CMOs were not necessarily natural monopolies under the analogue regime and are even less likely to be so under the new digital regime.<sup>87</sup> Some components, such as the databases of works and right holders may be, but the collection of revenue and the single assignment of rights clearly need not be. Because there is a strong commercial interest on the part of all stakeholders to have a comprehensive CMO — at least within genres — monopolies are likely to emerge naturally. It is difficult to see how competition will remain. Whether this will ultimately lead all to be in the same organisation or bodies organised along the lines of a particular repertoire is difficult to predict. One thing which seems abundantly clear is that national organisations are unlikely to survive. By allowing right holders to assign their rights in any way they want, but not permitting simultaneous assignment,<sup>88</sup> the result is likely to be a new system

of monopolies or oligopolies. The only difference will be the basis of the distinction, from national monopolies to repertoire-based ones.

- 47 Our reading of the Directive and our case studies suggest that:

- By mis-conceptualising CMOs, the remedies to ensure more competition have had unintended effects – for instance, the creation of clearing houses managed by CMOs rather than competition between CMOs;
- The Directive does not go far enough — rights are still assigned on an exclusive basis and therefore cannot be assigned to several agents at the same time;<sup>89</sup>
- In the matter of non-exclusive rights assignment several CMOs can license a work, so the user is not detrimentally affected; at the same time, right holders can exclude some badly managed CMOs, while remaining within the licensing regime.

- 48 Our research has also enabled us to identify a number of further questions:

- Given that licensing is intimately linked to the copyright system, should the copyright system be reformed to accommodate changes in licensing - in particular, for the protection of consumers and less successful authors?
- Are performing rights and their licensing really different from other works and rights (for example, e-books)?
- What problems should a reformed licensing system address? Is streaming equivalent to other disruptive technologies and/or initiatives in other markets such as Uber and Airbnb?

- 49 Given the importance of licensing practice to the

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even in this case the multi-territorial online use cannot only be assigned to one other CMO. It is therefore still a single CMO which can provide the license in practice.

<sup>87</sup> Katz, The potential demise of another natural monopoly: Rethinking the collective administration of performing rights, *Journal of Competition Law and Economics* 2015, 541-593, Katz, The potential demise of another natural monopoly: New technologies and the administration of performing rights, *Journal of Competition Law and Economics* 2006, 245-284.

<sup>88</sup> Under article 31 CMO Directive, simultaneous assignment is possible in the very limited circumstances that the CMO which usually administers the online use of works does not offer multi-territorial licenses and has not mandated another CMO to do so under the passport system. However,

<sup>89</sup> It is not required by the Directive that the same right for the same work is assignable to more than one CMO. Indeed, exploitation contracts explicitly prevent this. See for example: BUMA/ STEMRA, Exploitatiecontract A (auteur) (available at: <[http://www.bumastemra.nl/wp-content/uploads/2015/05/PV2.BUM\\_.512.0914.08-A3-SPEC-Exploitatiecontract-A-auteur-def.-d.d.-03.10.2014.pdf](http://www.bumastemra.nl/wp-content/uploads/2015/05/PV2.BUM_.512.0914.08-A3-SPEC-Exploitatiecontract-A-auteur-def.-d.d.-03.10.2014.pdf)>, last accessed 13/10), art 2(3) or GEMA, Berechtigungsvertrag (Fassung April 2016) (available at: <[https://www.gema.de/fileadmin/user\\_upload/Gema/Berechtigungsvertrag.pdf](https://www.gema.de/fileadmin/user_upload/Gema/Berechtigungsvertrag.pdf)>, last accessed 13/10/16), art. 1 and 1a; PRS for Music, Articles of Association (available at: <<https://www.prsformusic.com/SiteCollectionDocuments/About%20MCPS-PRS/prs-memorandum-articles.pdf>>, last accessed 13/10/16), art. 7.

legitimacy and effectiveness of copyright more broadly, linking the two directly at EU level is a potential avenue of fruitful reform. Although beyond the scope of this paper, future research should investigate how the effect of copyright is shaped by the licensing process. Key to this is the current absence of copyright contract law rules to cushion the effect of changes in the licensing practices for less successful artists. Furthermore, research should investigate the option of resorting to harmonisation (potentially in combination with a re-adjusted competition approach), as was done in areas of protection to standardise licensing practices and the availability of licenses across borders. Examining the effects of copyright in this context is especially important, given the on-going EU copyright review.

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